

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE  
COUNCIL, et al.,

Plaintiffs,

v.

KIRK C. RODGERS, etc., et al.,

Defendants.

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NO. CIV. S-88-1658 LKK

O R D E R

On July 28, 2005, this court issued an Order on Motion for Summary Judgment relating to the Endangered Species Act. In due course, plaintiffs moved for reconsideration of the court's order granting summary judgment to defendants relative to plaintiffs' causes of action concerning an asserted requirement of reinitiation of consultation.

The parties agree on what circumstances permit reconsideration, and the court will not pause to further address the matter save to note that either new law or plain error suffices. I do note, however, the government's contention that,

1 given the court's finding that the BOs in issue were arbitrary  
2 and capricious, plaintiffs' claims regarding reinitiation are in  
3 effect moot. On the one hand, the government's position seems  
4 correct; on the other hand, this court's determination is hardly  
5 the last word on the subject, and while the court feels  
6 confident it has done its best to resolve the difficult issue at  
7 bar, I cannot ignore the possibility of error. If the Ninth  
8 Circuit were to so conclude, the record on the reinitiation  
9 issue should be complete so as to avoid remand for further  
10 consideration. For that reason, the court now proceeds to  
11 resolve the motion.

12 For the reasons expressed in the defendants' opposition,  
13 the court concludes, as they maintain, that Washington Toxics  
14 Coalition v. E.P.A., 413 F.3d. 1024 (9th Cir. 2005), does not  
15 constitute new law bearing on the instant case. The facts at  
16 issue there, and the facts at issue in the matter at bar, are  
17 entirely disparate, and as the government noted, the  
18 Circuit explained that for that reason "EPIC did not apply  
19 here." Id. at 1033.<sup>1</sup>

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21 <sup>1</sup> Washington Toxics is inapposite to the instant case in  
22 another respect. The question at issue in Washington Toxics was  
23 whether the EPA was required to engage in consultation with the  
24 National Marine Fisheries Service before registering pesticide  
25 active ingredients that could have affected listed species, whereas  
26 the issue upon which plaintiffs base this motion to reconsider is  
whether federal defendants were required to *reinitiate* consultation  
after a decision was issued by Judge Wanger in 2002. As I noted  
in the order issued on July 28, 2005, the standards as to whether  
reinitiation of formal consultation is required is set forth under  
50 C.F.R. § 402.16. Whether an action agency is required to  
consult with the appropriate consulting agency to ensure that the

1       The question concerning manifest error is more difficult.  
2 Here, the question is two-fold: (1) whether O'Neil v. United  
3 States, 50 F.3d. 677 (9th Cir. 1995), compels a different  
4 result; and (2) whether the court overlooked language retaining  
5 discretion or control over the delivery of water for purposes of  
6 protecting endangered species, either by virtue of specific  
7 contract action or law. E.P.I.C. v. Simpson Timber Co., 255  
8 F.3d 1073 (9th Cir. 2001). I begin by noting that, as the  
9 government maintains, the issue in O'Neil is the liability of  
10 the government for withholding water, an issue which is  
11 different from whether the contract contains specific provision  
12 for withholding additional water for environmental purposes  
13 where there are changed circumstances. Thus, O'Neil does not  
14 directly require reconsideration. Nonetheless, as I now  
15 explain, O'Neill does bear upon the question of discretion.

16       The much more difficult issue tendered by plaintiffs'  
17 motion is whether there is, in fact, the kind of discretion  
18 required to permit reinitiation. All parties agree that, as in  
19 O'Neil, the Bureau retains the power to alter water delivery "to  
20 meet legal obligations," without incurring liability. Art. 12,  
21 Friant Dam Contracts. Judge Wanger's determination is a legal  
22 obligation. Accordingly, the government may alter deliveries to

23  
24 federal action is not likely to jeopardize the continued existence  
25 of an endangered or threatened species and that the action will not  
26 result in adverse modification of the designated critical habitat  
is governed by 16 U.S.C. § 1536 and 50 C.F.R. § 402.14. Order at  
19-20, 72.

1 accommodate that decision. On the other hand, Judge Wanger's  
2 decision addresses the entire Central Valley Project, and not  
3 just the water delivery under the contracts at bar. In sum, it  
4 cannot be said with certainty that ". . . the identified action  
5 is subsequently modified in a manner that causes an effect to  
6 the listed species or critical habitat in a manner or to an  
7 extent not previously considered in the biological opinion,"  
8 E.P.I.C. 255 F.3d at 1076, thus giving rise to an obligation to  
9 re-consult. If, in fact, the government decides that, by virtue  
10 of Judge Wanger's decision, it must reduce the amount of water  
11 diverted from these contracts to the Delta for aiding in  
12 preservation of fish, then the issue becomes ripe for  
13 reinitiation. I thus conclude that the previous decision is not  
14 clearly erroneous, and the motion for reconsideration must be  
15 DENIED.<sup>2</sup>

16 IT IS SO ORDERED.

17 DATED: October 5, 2005.

18  
19 /s/Lawrence K. Karlton  
20 LAWRENCE K. KARLTON  
21 SENIOR JUDGE  
22 UNITED STATES DISTRICT COURT  
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25 <sup>2</sup> Given the above disposition, the court need not consider  
26 whether, as Friant defendants maintain, the issue has been waived  
by plaintiffs.